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WILL INTERNATIONAL OCEAN LAWS IMPACT THE NEW NAVY STRATEGY?

By

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May 17, 1993

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the US Naval War College or the Department of the Navy.

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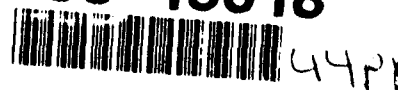
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## REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION <b>UNCLASSIFIED</b>		1b. RESTRICTIVE MARKINGS	
2. SECURITY CLASSIFICATION AUTHORITY		3. DISTRIBUTION/AVAILABILITY OF REPORT DISTRIBUTION STATEMENT A: APPROVED FOR PUBLIC RELEASE; DISTRIBUTION IS UNLIMITED.	
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE		5. MONITORING ORGANIZATION REPORT NUMBER(S)	
4. PERFORMING ORGANIZATION REPORT NUMBER(S)		7a. NAME OF MONITORING ORGANIZATION	
6a. NAME OF PERFORMING ORGANIZATION <b>OPERATIONS DEPARTMENT</b>	6b. OFFICE SYMBOL (if applicable) <b>C</b>	7b. ADDRESS (City, State, and ZIP Code)	
6c. ADDRESS (City, State, and ZIP Code) <b>NAVAL WAR COLLEGE NEWPORT, R.I. 02841</b>		9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER	
8a. NAME OF FUNDING/SPONSORING ORGANIZATION	8b. OFFICE SYMBOL (if applicable)	10. SOURCE OF FUNDING NUMBERS	
8c. ADDRESS (City, State, and ZIP Code)		PROGRAM ELEMENT NO.	PROJECT NO.
		TASK NO.	WORK UNIT ACCESSION NO.
11. TITLE (Include Security Classification) <b>WILL INTERNATIONAL OCEAN LAWS IMPACT THE NEW NAVY STRATEGY? (v)</b>			
12. PERSONAL AUTHOR(S) <b>CDR MICHAEL C. MASLEY, JR., USN 020-44-6507/1110</b>			
13a. TYPE OF REPORT <b>FINAL</b>	13b. TIME COVERED FROM TO	14. DATE OF REPORT (Year, Month, Day) <b>1993 May 17</b>	15. PAGE COUNT <b>36</b>
16. SUPPLEMENTARY NOTATION A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations. The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.			
17. COSATI CODES		18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)	
FIELD	GROUP	SUB-GROUP	
19. ABSTRACT (Continue on reverse if necessary and identify by block number) Operational level planning includes use of environmental and hydrographic information. United States national and military strategies, now focused on regional and littoral contingencies, dictate update and/or development of a more expansive bank of such reference information to support operational planning. The comprehensive 1982 United Nations Convention on the Law of the Sea is about to come into force which codifies, amongst many areas, coastal state rights in controlling activities in their Exclusive Economic Zones (EEZ), including Marine Scientific Research (MSR). A complex issue has emerged linking the new international ocean laws and U.S. national and military strategies and policies. Since hydrographic research (HS) is not recognized by the 1982 Convention, and the United States is not acceding to the 1982 Convention, coastal states are pressuring and/or challenging the United States by limiting or denying American hydrographic activities within the coastal state's waters, which now include EEZs. U.S. national and U.S. Navy hydrographic policies have been promulgated, but (our)			
20. DISTRIBUTION/AVAILABILITY OF ABSTRACT (Ops A.A. 111) <input checked="" type="checkbox"/> UNCLASSIFIED/UNLIMITED <input type="checkbox"/> SAME AS RPT. <input type="checkbox"/> DTIC USERS		21. ABSTRACT SECURITY CLASSIFICATION <b>Unclassified</b>	
22a. NAME OF RESPONSIBLE INDIVIDUAL <b>CHAIRMAN, OPERATIONS DEPARTMENT</b>		22b. TELEPHONE (Include Area Code) <b>841-3414</b>	22c. OFFICE SYMBOL <b>C</b>

19. ABSTRACT

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Epigraph

"When program and policy decisions are the result of multiple actions by multiple actors....with multiple views... there can be no single correct decision..."

- Carol H. Weiss (1987)

"Those who do not know the conditions of mountains and forests, hazardous defiles, marshes and swamps cannot conduct the march of an army..."

Know the enemy, know yourself; your victory will never be endangered. Know the ground, know the weather; your victory will then be total."<sup>1</sup>

- Sun Tzu

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ABSTRACT OF  
WILL INTERNATIONAL OCEAN LAWS IMPACT THE NEW NAVY STRATEGY?

Operational level planning includes use of environmental and hydrographic information. United States national and military strategies, now focused on regional and littoral contingencies, dictate update or development of a more expansive bank of such reference information to support operational planning. The comprehensive 1982 United Nations Convention on the Law of the Sea is about to come into force. It codifies, amongst many issues, a coastal state's rights in controlling activities in the Exclusive Economic Zones (EEZ), including Marine Scientific Research (MSR). A complex issue has emerged linking these new ocean laws and U.S. national and military strategies and policies. Hydrographic research (HS) is not recognized by the 1982 Convention, and the United States is not acceding to the 1982 Convention. However, coastal states are pressuring and/or challenging the United States by limiting or denying American hydrographic activities within the coastal state's waters, which now include EEZs. U.S. national and U.S. Navy hydrographic policies have been promulgated, but they are somewhat disjointed and require a more unified effort. If hydrographic data availability is restricted, operational planners may be forced to rely on less accurate, alternative sources of information, and may have to adjust long-used methodologies in developing contingency plans.

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# LIST OF ABBREVIATIONS

AFSC	- Armed Forces Staff College
Art	- Article; refers to elements of the 1982 Law of the Sea Convention
CNO	- Chief of Naval Operations
DMA	- Defense Mapping Agency
DON	- Department of the Navy
EEZ	- Exclusive Economic Zone
GPS	- Global Positioning System
HS	- Hydrographic Survey
JAGC	- Judge Advocate General Corps
LOS	- Law of the Sea
MS	- Military Survey
MSR	- Marine Scientific Research
NOAA	- National Oceanic and Atmosperic Administration
UN	- United Nations
US	- United States
USN	- United States Navy



# WILL INTERNATIONAL OCEAN LAWS IMPACT THE NEW NAVY STRATEGY?

## CHAPTER I

### PROLOGUE

#### The Current Situation

The end of the Cold War has not provided the international community with enduring peace and a new world order. Rather, it has ushered in an era of increased ethnic and regional conflicts. To deal with these new and potential threats, the United States has completed extensive revisions to national policy, the national security strategy and the national military strategy. Concurrent with strategic improvements, radical changes are being implemented in the organization and employment of United States national security forces with a new focus on regional, vice global, crisis responses.<sup>2</sup> These changes have triggered a subsequent cascade of transformation across the spectrum of the Department of Defense. Concurrent with increasing domestic and fiscal pressures, restructuring of the U.S. armed services is proceeding at a brisk pace.

The U.S. Navy's "...From the Sea" reflects such efforts at reorganization and restructuring:

"...Our strategy has shifted from a focus on a global threat to a focus on regional challenges and opportunities ...and to concentrate more on capabilities required in the complex operating environment of the "littoral" or coastlines of the earth."<sup>3</sup>

"... Mastery of the littoral should not be presumed... It is an objective which requires our focused skills and resources... Fiscal realities and a newly defined regional, littoral naval focus require new thinking, significant changes and a commitment to undertake challenging tasks..."<sup>4</sup>

#### OPERATIONAL COMMANDERS AND REGIONAL CONTINGENCY PLANNING

At the operational level of warfare, development of courses of action for contingency plans are historically driven by two basic considerations: 1) the relative combat power of opposing forces and 2) the characteristics of the area in which the operation is to be conducted.<sup>5</sup> The latter includes, among many,

the geographic, climatology, topography, hydrographic and oceanographic attributes. While many of these characteristics do not fluctuate drastically over time, the perishable nature of oceanographic and hydrographic data demand periodic update.<sup>6</sup> Successful operations in the world's littoral, as defined in the Navy's new strategy, will require use of navigation and bathymetric soundings, seasonal tide, current, salinity and meteorological measurements, as well as bottom, beach, and terrain data. From the viewpoint of operational level commanders, environmental data collection directly supports design and execution of contingency plans. Current service and joint warfare doctrines which address contingency planning and formation of Commander's Estimates mandate inclusion of this information.<sup>7</sup> Environmental effects acutely influence the performance of men and equipment on both sides. All can support or wreak havoc on a force's ability to project power ashore, including, for example, its maneuverability, speed, lines of advance, logistics support, air operations and cover. Environmental factors must be exploited to achieve conditions favorable to successful mission completion.<sup>8</sup>

Under the changing national and military strategies, the focus of hydrographic surveys and research has shifted from deep ocean areas to coastal regions. As operations are conducted closer to shore, littoral hydrographic information assumes greater importance to operational commanders and planners as they generate offensive and defensive applications. Understandably, the amphibious landing and follow-on sustainment operations would be affected by the range of tides, density of beach soil, gradient of beach berms and coastal shelf, and prevailing wind and water conditions. But hydrographic information now needs closer study to assess potential threats to these amphibious operations - such as those posed by mines or diesel submarines operating in shallow water. Although the United States possesses the second largest fleet of research and survey vessels in the world,<sup>9</sup> updating existing data or collecting and recording new data poses a time-consuming and monumental task. Wholesale use of space-based or other remote recording and sensor systems is not currently practical due to the limited numbers of available systems, the extended processing time

required and costs to deploy large numbers of new systems. Despite widely acclaimed use of military and civilian space-based systems in Operation Desert Storm to assist operational commanders in developing military plans,<sup>10</sup> current systems and techniques are still considered embryonic. Austere budget environments will impact two related areas. Creation and deployment of advanced U.S. systems, and the conduct of updating surveys will be delayed in the face of decreasing resources. Obvious increases in risk to operating forces would occur without this input of reliable data. These are the conspicuous problems which will ultimately affect operational planners using hydrographic and oceanographic measurements. However, an even more potent barrier to gathering ocean data may exist in emerging international law known as the 1982 United Nations Convention on the Law of the Sea (hereafter the 1982 LOS Convention). If the 1982 LOS Convention is restrictively interpreted, it could limit or deny the Navy's (and other national agencies') ability to obtain environmental data necessary to support littoral warfare planning.

#### EMERGENCE OF NEW INTERNATIONAL OCEAN LAWS

As with many complex, contemporary issues, there is no simple solution for the problem, particularly in the context of an international arena of competing interests. Components of the predicament include: the extensive historical influence of the United States in developing the framework for the 1982 LOS Convention; the failure of the 1982 LOS Convention to recognize hydrographic or military research; the international community's growing concern over the U.S. refusal to sign the 1982 LOS Convention (despite its key historical leadership and contributions to it); and the potentially pernicious impact at the strategic, operational and tactical levels of a failure to obtain necessary hydrographic data. Navy operational commanders should be aware of the significance of the 1982 LOS Convention and its pending impact, in addition to understanding domestic strategies and policies, in order to function effectively. They should look beyond U.S. Navy Regulations (1991) Article 0705, which compels observance of international law,<sup>11</sup> and strive to understand the weighty implications of the

1982 LOS Convention. For certainly international law does affect United States national strategy and policy formulation. It is:

"...that body of rules which nations consider binding in their relations with one another... If one nation violates the law, it may expect others will reciprocate...(with) greater political and economic costs than...observance." <sup>12</sup>

In evaluating this complex issue from the 'big picture' perspective, a better appreciation should be gained of the constraints and conflicts which have emerged from competing domestic and international spheres. Both influence a commander's ability to plan and execute missions in support of national objectives. Therefore it is prudent, particularly for operators who may not have the technical or historical background, to review past and current events which led to this dilemma. These include the evolution of a coastal state's ocean rights, the emergence of the Exclusive Economic Zone and Marine Scientific Research in international law, and the historical role of the United States in development of the 1982 LOS Convention. This will be completed prior to addressing the scope of the predicament and reviewing potential solutions in the remainder of this paper.

## CHAPTER II

### 1982 UN CONVENTION ON LAW OF THE SEA

#### MULTIPLE INTERRELATED ISSUES

The 1982 LOS Convention was the result of over ten years of lengthy meetings and a truly concerted effort on the part of the international community. Since first being signed on December 10, 1982 by 118 states, it has opened the proverbial floodgates of influence on the development of international oceanic law across a broad expanse of interests. Few treaties have produced, or will continue to produce, such an abundance of interpretations, reviews, commentary, general discussion and potential for tension. In broad terms, the Convention sought to formalize and restate a sweeping spectrum of existing laws which were generally accepted as custom by the world community.<sup>13</sup> Overarching themes reinforced were those of a coastal state's duties and rights over adjacent waters and the continental shelf, the concurrent provision of certain rights of other states in the new coastal waters regime and continued recognition of freedoms on the high seas. More importantly (as related to this paper's issues), it codified a 200 mile Exclusive Economic Zone (EEZ) as a definite part of international law in Part V (Articles 55-60), defined coastal states' rights in controlling activities in the EEZ, standardized regulations concerning freedom of navigation, and provided for new rules concerning marine scientific research (MSR).<sup>14</sup> The 1982 LOS Convention requires the ratification of 60 states to come into force. It has been described by the Chairman of the Group of 77 in 1985 as, "...next to the Charter, the most important multilateral instrument in the history of the United Nations." <sup>15</sup> Shortly after being signed, the U.N. Secretary General reported in 1984 that, although the 1982 LOS Convention was not yet in force, it was having a 'stabilizing effect' on the laws of the sea. Its effectiveness is being judged in a host of areas which include: increased international concern about, and cooperation on, use of the world's oceans, reconciliation of competing states' interests, improving attitudes of states towards marine affairs, and

influencing coastal states' actions to conform to the 1982 LOS Convention guidelines, particularly with respect to boundary creation. Further, the International Court of Justice has begun to rely more heavily on provisions of the 1982 LOS Convention.<sup>16</sup>

Prior to the 1982 LOS Convention, MSR and hydrographic research/survey could be executed unimpeded under the aegis of freedom of the high seas outside a coastal state's territorial seas.<sup>17</sup> However, great variances developed in coastal state regulations extending beyond the territorial sea, fueled by unilateral implementation of an EEZ by a growing number of nations. Over time, the wide scope of practices were accepted by increasing numbers of the international community and evolved into customary law.<sup>18</sup> Since the 1970's, coastal states with EEZs, particularly the developing countries, sought more stringent control over MSR as they recognized a number of key factors. These included appreciation of: 1) the economic potential of the adjacent oceans and continental shelf contained therein; 2) the importance of MSR to effective exploitation of ocean resources; 3) the emerging new technologies to carry out the research; 4) the expanding scale of MSR by a growing number of industrialized countries, and 5) the increased capability to tap ocean and seabed resources. The aggressive pursuit of strict MSR regulations by coastal states (out of fear of exploitation by industrialized countries) alarmed the scientific community who feared that any form of ocean research, repressed by new rules, would hinder global understanding of the oceans and its resources. The international legal regime for EEZs and MSR codified by the 1982 LOS Convention reflects but one of many compromises meeting the needs of all parties.<sup>19</sup>

MSR conducted within the EEZ is recognized by the 1982 LOS Convention as a right to be pursued by any state (Art 238).<sup>20</sup> Further, it is generally described as research "carried out exclusively for peaceful purposes for the benefit of mankind as a whole" (Arts 240, 246) where the exchange of information must be promoted (e.g., the researching state must publish the results of its MSR for all nations' information).<sup>21</sup> In spite of the 1982 LOS Convention's attempt to cover a wide range of topics in detail, delegates failed to reach an agreement

on a precise definition of MSR - rather it is described in general principles (Art 240). Hydrographic research or survey (HS) and military research or survey (MS) were not regarded as coming within the Convention's concept of MSR, even though data of military importance could be gleaned from MSR findings. This is a key point concerning this paper.

Coastal states expressed anxiety, centered on potential loss of economic and military interests, if they lost control of MSR in the waters of EEZ's. Aside from economic exploration and exploitation of coastal resources, they also dreaded covert intelligence and military operations which could be conducted under the guise of MSR. Their apprehensions were allayed somewhat by the 1982 LOS Convention's protection offered in the language requiring prior notification, prior permissive consent and/or presence of the coastal state's observers on MSR vessels. Further, the conduct of any form of MSR during the exercise of transit passage, innocent passage or archipelagic sea lanes passage was specifically prohibited (Arts 21, 40, 49 and 54), unless previously approved by the coastal state.<sup>22</sup> Article 19 stipulates that research or survey activities conducted within the territorial seas is "prejudicial to the peace, good order, or security of the coastal state."<sup>23</sup>

As provided by the 1982 LOS Convention, a state or international organization desiring to conduct MSR within another state's territorial waters, EEZ or on the continental shelf must obtain that state's consent and prescribed conditions through formal requests submitted six months prior to the expected starting date of the project. (Arts 245-248). International cooperation is promoted by the 1982 LOS Convention stipulating that coastal states should grant consent to MSR requests without delay or unreasonable objection (Arts 242, 245-246). Of special interest, the 1982 LOS Convention endeavors to remove barriers to conducting MSR. Article 252 delineates and provides "implied consent" to a researching country to conduct MSR, if the coastal state fails to provide a response to the researching state's request within four months of receipt. W. C. Extavour provides a detailed analysis of the related articles, and states this alternative authority to conduct MSR is a device which seems to make the whole

notion of a coastal state's rights purely an illusion.<sup>24</sup> On closer analysis, the potential for denial exists, and a coastal state which routinely denies permission to states requesting permission for survey may actually impede the progress of hydrographic and oceanographic research - contrary to the intent of the 1982 LOS Convention.

Alfred Soons sheds a bit more light on what might be a confusing issue in differentiating MSR and HS/MS, and when a coastal state's rights come into play (Arts 58 and 59). If military and hydrographic research operations are not recognized as MSR, and do not create a conflict between the interests of the coastal and researching states, he reasons the traditional rule of freedom should apply - meaning the coastal state should have no jurisdiction over the activity. Additionally, he argues that if HS is not recognized as MSR by the 1982 LOS Convention, and is performed to lay submarine cables or pipelines, or to improve safety of navigation (as it generally is), then it must be regarded as an internationally lawful use of the sea which can be conducted in the EEZ without jurisdiction by the coastal state. Coastal state authority should only apply when HS activities are "connected with the exploration and exploitation of the EEZ (resources)".<sup>25</sup>

As of May 1993, widespread international acceptance of the 1982 LOS Convention is clearly continuing. 127 states have territorial seas not exceeding 12 miles, 17 have territorial sea claims extending beyond 12 miles, 86 states have declared EEZs extending out to 200 miles, 38 states have adopted a 24 mile contiguous zone,<sup>26</sup> and 55 nations have now ratified the 1982 LOS Convention.<sup>27</sup> Ratification by 60 nations is required for the treaty to enter in full force, which occurs after a one year waiting period. As a further indication of the 1982 LOS Convention's importance, U.N. General Assembly Resolutions, voted on an annual basis, are attempting to drive the 1982 LOS Convention closer to the 60 nation requirement. Time is running short for member nations to voice objections and plead cases to possibly amend the Convention, the latter being a remote possibility at best.<sup>28</sup>



## US HISTORICAL INFLUENCE ON THE 1982 LOS CONVENTION

America's role in providing a framework for the 1982 LOS Convention is most noteworthy and must be considered in this dilemma. Its ocean resources policies originated near the beginning of the 20th century. Offshore oil was being drawn from the California shelf as early as 1894. In 1918, private interest requests for information on how to obtain submerged land rights 40 miles into the Gulf of Mexico caught the State Department unprepared for such initiatives. The State Department was content to cite lack of jurisdiction past the existing 3 mile territorial seas limit, and little effort was made to address the issue. A Japanese invasion of Alaskan salmon fishing grounds in 1936-1938 stirred public emotions and drove the State Department to threaten unilateral actions if the Imperial government did not cease their actions. Cordell Hull subsequently obtained a temporary fishing ban from the Japanese government, but it was to shortly be overcome by World War II.<sup>29</sup>

In 1938, submerged land rights beyond the 3 mile limit resurfaced with the fisheries problem, only this time they caught the attention of President Roosevelt. His proposal to the Department of the Interior sought an Executive Order to create "naval oil reserves on the coast beginning with the shore line and extending halfway across the ocean." The Department's tepid response, which cited the proposal's doubtful legality based on existing international law (seabed outside the 3 mile limit was owned by no one and free to all), dismayed the President who wrote:

"I recognize that new principles of international law might have to be asserted, but such principles would not in effect be wholly new, because they would be based on the consideration that inventive genius has moved jurisdiction out to sea to the limit of inventive genius."<sup>30</sup>

Through Roosevelt's prompting of the State Department and Department of the Interior, Presidential Proclamations were created to lay claim to living and non-living resources of the continental shelf, while preserving freedom of navigation on the waters above the shelf. However, Roosevelt's death on April 12, 1945 delayed their release until September 28, 1945 when the world learned of them as

the Truman Proclamations on the Continental Shelf and Fisheries. The Proclamations were not all-encompassing, but fit America's needs at that time out to 100 fathoms and continued to champion freedom of navigation rights. The authors of the Proclamations could not have realized the far-reaching effects their initiatives would produce (see appendices I through III to gain insights into the thinking of the time). These documents provided the underpinnings for what is now recognized in international law as an EEZ.<sup>31</sup>

When the International Law Commission (ILC) was created in 1949, it began a process to codify international law, including a regime for the high seas. After several meetings continuing through 1958, the ILC efforts, using and expanding upon the Truman Proclamations, eventually evolved into the first United Nations Conference on the Law of the Sea (UNCLOS I). This conference created the four 1958 Geneva Conventions; those on the Territorial Sea and Contiguous Zone, the High Seas, Fisheries and Conservation of Living Resources of the High Seas, and the Continental Shelf.<sup>32</sup> In the latter, several recurring issues were addressed. The continental shelf and all living and non-living resources were defined. Coastal states' rights over the shelf were extended outward to a 200 meter depth (or to the depth of 'exploitability'). Further, these rights were articulated to permit local regulation of the shelf area (verbiage was changed from sovereign to exclusive rights), and an attempt was made to define Marine Scientific Research. Close review and comparison of the 1958 Geneva Convention on the Continental Shelf to the 1982 LOS Convention reveals striking similarities. The major exception entails shelf jurisdiction demarkation. The limits were increased from the indefinite 200 meters (or the 'exploitability' test) to a fixed distance criteria of 200 nautical miles (NM) seaward, or if the physical shelf extends beyond 200 NM, either to 350 NM or 100 NM beyond the 2500 meter isobath.<sup>33</sup>

United States Navy interests over this period were driven by fears of losing freedom of navigation rights along foreign coasts and the closure of straits, if extended territorial seas became the norm. Offshore exploitation was viewed by the Navy as a complicating nuisance in conducting anti-submarine

warfare (ASW) in time of national emergency, and in deploying new technology hydrophone arrays (Project Caesar). In the 1960's, continental shelf deployment considerations for deterrent systems (silo based Polaris missiles and a complete undersea submarine base (Project Rocksite)) led the Navy's argument against leasing of United States offshore areas. However, when the projects' costs were determined to make the space program's budget seem like a drop in the proverbial bucket, the Navy's objections were dropped. This opened the way for a clear Department of Defense position, concurring with that of the State Department, in favor of coastal state jurisdiction over expanded continental shelf areas.<sup>34</sup>

Additional American initiatives contributed to various areas of interest embodied in the 1982 LOS Convention. In 1967, the Pardo Initiative to the American Draft Treaty of the International Seabed Area sought to set aside all submerged lands beyond the 200 meter benchmark exclusively for peaceful purposes, and to use its resources for the benefit of all mankind.<sup>35</sup> In fact, the Maltese Mission to the United Nations proposed an agenda item (the basis for the Pardo Initiative) for the General Assembly as follows:

"Declaration and treaty concerning the reservation exclusively for the peaceful purposes of the seabed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."<sup>36</sup>

The Maltese submitted the item out of trepidation over increasing competition (and potential conflict) between major industrialized states for seabed areas (addressed in the draft American treaty) further offshore. International debates on the American and Maltese proposals raged during 1967-1969. The United States ultimately amended its original proposal to include a ban on any military installations or weapons of mass destruction on the seabed outside the 3 nautical mile territorial sea limit recognized at that time. But, it also vigorously objected to seabed mining proposals, perceived as detrimental to the international community and free market economics.<sup>37</sup> In 1970, the Nixon Proclamations called for creation of a multilateral treaty to establish an international regime to address seabed resource exploitation beyond the 200 meter demarkation. The United States government submitted yet another draft treaty,

this time to the U.N. Seabed Committee, which was again mulled over by delegates for several years. American objections to seabed mining proposals continued.<sup>38</sup> In 1972, the U.N. Seabed Committee was startled by developments from both the Santo Domingo Conference of Caribbean Countries on Problems of the Sea and the African States Regional Seminar on Law of the Sea. Each meeting endorsed creation of a 200-mile wide exclusive economic zone, complete with coastal state controls, "without prejudicing freedom of navigation, overflight, or the laying of submarine cables or pipelines" and with no restrictions "...other than those resulting from the exercise by the coastal state of its rights within the area."<sup>39</sup> A 1973 draft American treaty on Law of the Sea and EEZ addressed new concerns over fisheries and pollution control, the regime for deep ocean space and, more importantly, the regime of scientific research. The draft U.S. articles provided a balance between a coastal states' legitimate concerns and the need to facilitate research with a minimum of restrictions. It was the model upon which many 1982 LOS Convention articles concerning MSR, EEZs, freedom of navigation and coastal states' rights were based.<sup>40</sup>

Because of this strong historical influence in pioneering and promoting international law on the oceans and their use, it was a shocking surprise to many countries that the United States would neither sign nor ratify the 1982 LOS Convention. Principle objections remained with the Deep Sea Bed Mining regime and the proposed International Sea Bed Authority. In 1982, the American delegation presented the U.N. Conference with over 230 proposed changes to the draft LOS Convention to meet national concerns - all of which were either defeated or withdrawn.<sup>41</sup> Despite sustained international criticism and pressure, the United States still has not acceded to the 1982 LOS Convention. In 1991, it abstained on a General Assembly Resolution developed to accelerate acceptance of the Convention, rather than repeat previous 'no' votes. Despite the diplomatic shift, serious objections still remain with the Deep Sea Bed Mining regime and "market principle" language.<sup>42</sup> In order to understand the American response, one has to appreciate the protocol within the 1982 LOS Convention. While the United States generally accepts most of the 1982 LOS

Convention (17 parts and 9 annexes), Article 309 specifically calls for states to accept the Convention with "no reservation or exception" - an all or nothing proposition. Given the level of American objections to, and apprehension over, the Deep Sea Bed Mining regime and the inability to exempt itself from that regime, there was no real alternative to neither sign nor ratify the decision.<sup>43</sup> Regardless of the protocol, various forms of pressure have come to bear on the United States, including coastal state responses to American HS activities.

Joining a growing list of 58 other nations, President Reagan declared a 200-mile EEZ on March 10, 1983. The country suddenly gained jurisdiction over 3.9 billion acres of ocean and shelf area, 1.7 times that of the 2.3 billion land acres comprising the land area of the United States and its territories (see Figure 1). Its significance to the future of the nation may well exceed that of the Louisiana Purchase in 1803.<sup>44</sup> However, the government stated it would not exercise its right of jurisdiction over MSR in the EEZ beyond the territorial waters, in the interest of promoting MSR and avoiding "any unnecessary burdens." The national policy statement also recognizes the rights of other states to exercise jurisdiction over MSR within 200 miles of their coast on the condition it is exercised reasonably and in consonance with international law.<sup>45</sup> The status of the 1982 LOS Convention and American national ocean policies have not changed since.

The 200 Nautical Mile  
Exclusive Economic Zone  
of the United States

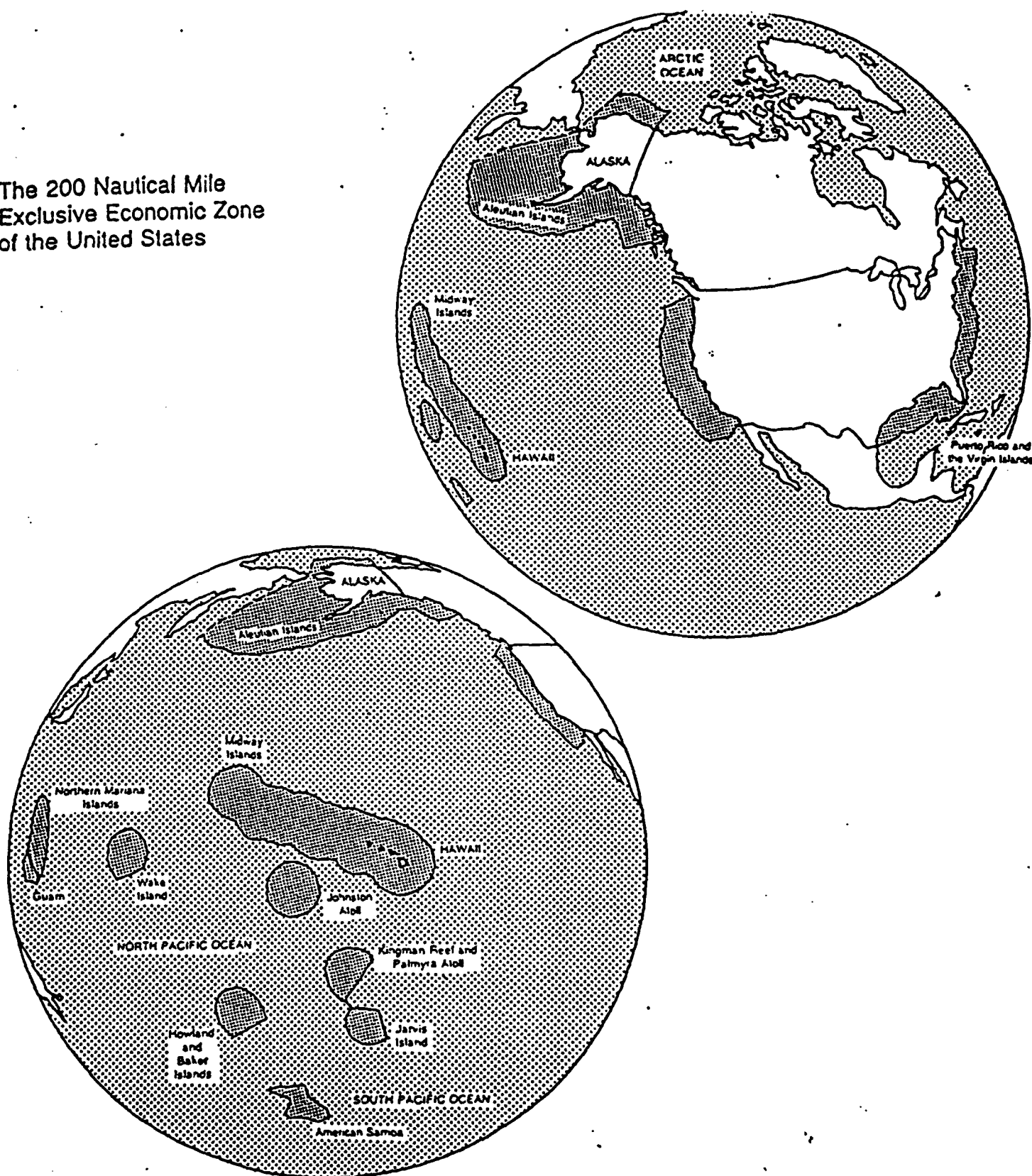


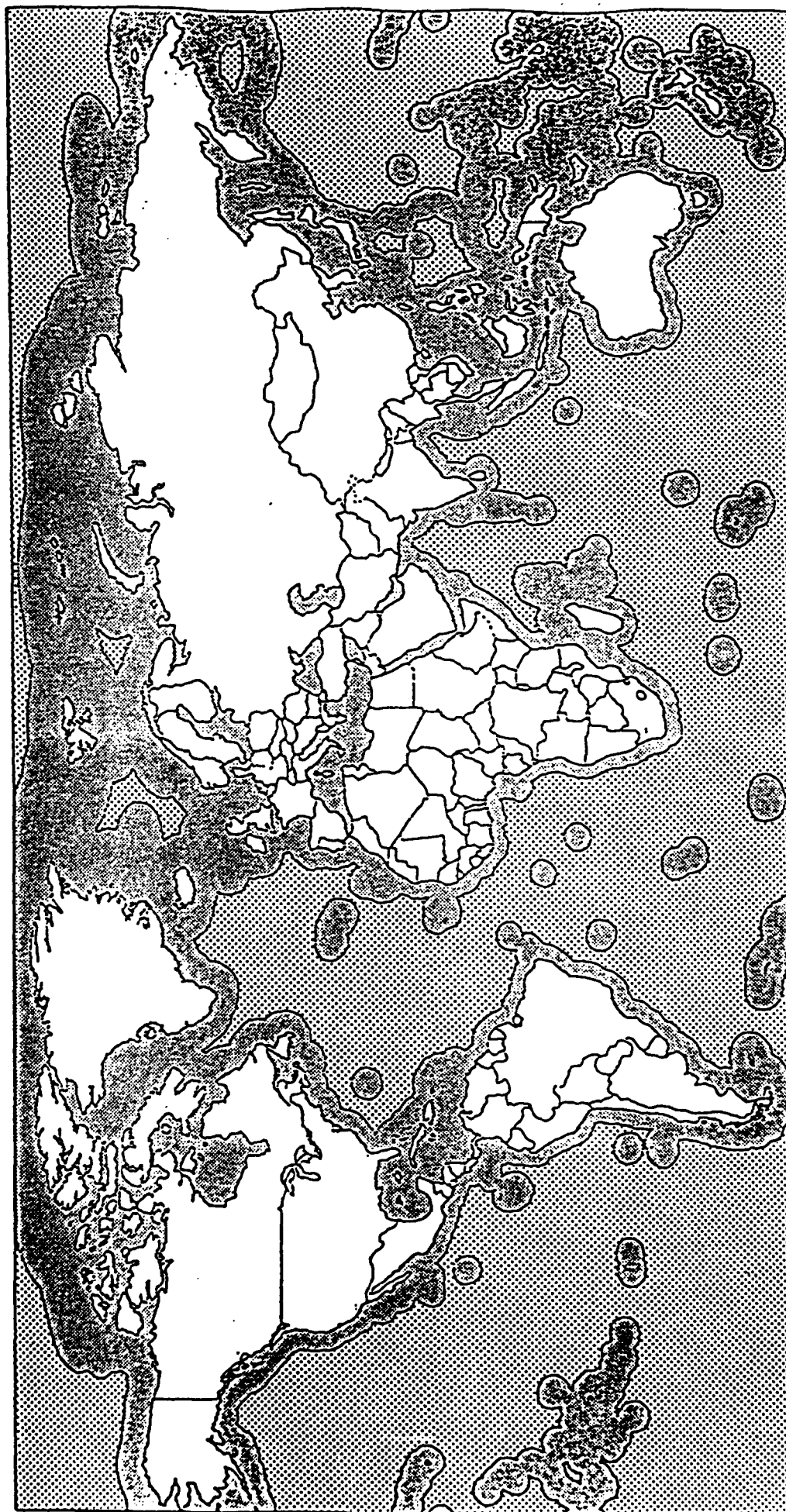
Figure 1.—The U.S. Exclusive Economic Zone as Specified by Presidential Proclamation, March 10, 1983.

CHAPTER III  
IMPACTS ON THE NEW NAVY STRATEGY

CONFLICT FOR THE OPERATIONAL COMMANDER

Hopefully this wealth of background information has fostered an appreciation of the complex interrelationships between elements of the 1982 LOS Convention, and America's historical role in developing international ocean laws. Now, how does all this relate to "From the Sea..." and impact an operational commander's ability to develop contingency plans and conduct operations? Recalling major points from the 1982 LOS Convention (e.g., freedom of navigation, MSR, rights and regulations for coastal and researching states, EEZ rules, lack of recognition of HS and MS as MSR, and the United States' non-ratification of the 1982 LOS Convention) a commander should reasonably be expected to ask a litany of questions when planning operations in the littoral. What may happen to US vessels conducting HS within a foreign EEZ? Do American HS and MS vessels need to comply with the MSR request requirements of the 1982 LOS Convention? What legitimate rights, if any, does the coastal state have to control such activities in their EEZs? If controlled, how will this influence ocean surveying and the planning and actual conduct of operations to support regional objectives embodied in the new U.S. strategies? How can the United States legitimately pursue its interests in the EEZs of other states, and, in doing so, provide the operational commander essential tools to support operations? What are the national policies concerning this issue which need to be followed? Are there other sources of HS and MS data which are available to reduce the levels of risk to operating forces? These are important points to ponder, especially when considering the average age and perishable nature of coastal hydrographic data. Further, when pondering the new Navy strategy, over 40% of the entire ocean area of the earth may be encompassed within coastal state EEZs. (See Figure 2).<sup>46</sup> Although future reactions of coastal states to U.S. hydrographic activities in this context are uncertain, some answers to the questions just posed can be derived by examining current national and U.S. Navy policies.

# Potential 200 Nautical Mile Zones



200 nautical mile zones

Figure 2.—General Characterization of Areas of Potential Extended Jurisdiction 200 Nautical Miles Off the Coasts  
Source: U.S. Department of State



## U.S. NATIONAL POLICY

America's national policy concerning these critical issues was first addressed in 1985 in a cable from Secretary of State George Schultz to all diplomatic missions:

"....MSR is the general term most often used to describe those activities undertaken in the ocean and in coastal waters to expand scientific knowledge of the marine environment. MSR includes oceanography, marine biology, fisheries research, scientific ocean drilling, geological/geophysical scientific surveying, as well as other activities with a scientific purpose. MSR is not defined in the Law of the Sea Convention because a widely accepted definition could not be developed. When commercial companies conduct activities similar to those mentioned above for commercial resource purposes, most governments, including the U.S., do not treat them as MSR. Additionally, activities as hydrographic surveys, the purpose of which is to obtain information for the making of navigational charts, and the collection of information that, whether or not classified, is to be used for military purposes, are not considered by the U.S. to be MSR and therefore not subject to coastal state jurisdiction. As such, it is extremely important that these other activities not be treated as MSR or processed accordingly."<sup>47</sup>

Draft 1991 State Department correspondence reiterates the 1985 policy in clearer and much stronger terms. It emphasizes the distinction of HS and military survey from MSR, and links the former to ships enjoying sovereign immunity. The documents further underscore the lack of jurisdiction of any coastal state over these activities.<sup>48</sup>

The Navy quickly updated its own related directive in 1991 reflecting the stronger, draft State Department policy. It clearly defines territorial seas, archipelagic waters, EEZ, continental shelf, high seas, marine data collection, MSR, HS and MS. HS and MS are not considered MSR, and when executed outside foreign territorial seas or archipelagic waters, are not subject to coastal state regulation, and do not require diplomatic clearance (the MSR consent request specified in the 1982 LOS Convention).<sup>49</sup> Regrettably, the 1991 State Department materials remained in draft form, and were not released under the Bush Administration. An official release in the near future is not likely. New officials of the Clinton administration are still being appointed and just beginning their transition reviews.<sup>50</sup>

### INTERNATIONAL TRENDS

Despite the delay in promulgating more current State Department guidance, the United States national policy concerning the conduct of HS and military survey is clearly articulated and has been disseminated to both the naval service and the diplomatic corps. The latter has been tasked to inform host countries of the HS related national ocean policy and to strictly adhere to proper survey processing procedures. While aggressive intra-governmental agency dialogues continue, discrepancies exist in guidance for the operational and tactical level commanders. These inconsistencies contradict national policy and provide confusing direction. International 'incidents' at sea may inadvertently result (See Author's Note).<sup>51</sup> In fact, two 'incidents,' related to the HS issues addressed in this paper, have occurred in the recent past. One involved the U.S. and Brazil and the other the U.S. and Iceland. While no further confrontations have transpired, one should take note of coastal states' rising interest in obtaining any hydrographic information relating to its EEZ, regardless of intended end use, out of fear of economic exploitation. Novel international interpretations of the 1982 LOS Convention, backed by coastal state laws, have created additional problems. For example, the government of Mexico is arbitrarily assessing \$800 fees on any vessels conducting MSR in the Mexican EEZ - even those who merely claim transit through their waters.<sup>52</sup> All such episodes involving the United States are being aggressively tracked through diplomatic and Navy channels to reach acceptable solutions. Despite a lull in incidents, the glaring, open-ended question remains - will similar affairs erupt in the future and if so, how frequently? One should recall that while the Navy's policy has been in circulation over 24 months, the draft 1991 State Department cables have yet to be released in official diplomatic channels! This appears to be fostering a wide range of international responses as coastal states simply say published U.S. Navy policy is not U.S. national policy.

If the United States were to concede that HS and MS were subject to coastal state regulation, accurate gathering and recording of hydrographic and militarily significant data may be delayed or denied entirely. Lacking viable data,

regional contingency planning and operations could be negatively impacted, placing forces at increased risk. History is rich in examples where operational commanders demanded accurate hydrographic data, recognizing their potential impact on campaign and tactical planning. Such information was recognized as a basic and essential tenet of successful operations (e.g., the allied invasion of Normandy, the Inchon landing in the Korean War, the mining of Haiphong Harbor, etc). The continuing, significant role of such information should not be overlooked in the high technology environment of today's military operations. As such, coordination by national level authorities must be improved if national policies are to provide credible support mechanisms for operational level planners, as well as operational and tactical level commanders.

#### POTENTIAL SOLUTIONS

To reduce repetitions of the previously mentioned MSR-related incidents, the U.S. government and Navy should exhibit a strong, even-handed will to pursue common national aims and continue an aggressive, sustained policy information dissemination program. This approach can be executed through an existing government framework - diplomatic channels, Navy and Coast Guard networks, continued exercise of freedom of navigation and HS rights, and by distribution of official publications, regulations and laws clearly portraying the national policy. By actively working in these areas, the United States may gain wider acceptance of the policy. While this practice is generally accepted as customary international law in the world community, it is recognized there are states which simply will not accept this practice. At national levels of authority, an amendment to the 1982 LOS Convention may be pursued to include these changes through the U.N. General Assembly's annual review and vote on the 1982 LOS Convention, prior to it coming into force. However, these may prove insufficient and untimely to address MSR/MS/HS issues if international incidents persist in the near future. Further, the time to do so is running short - recall that only five more nations are required to ratify the 1982 LOS Convention before it comes into force. Procedures in Articles 312 and 313 permit 1982 LOS Convention

amendment, but only 10 years after it comes into force. In the simplified U.N. protocol, a lack of a single opposition vote within a 12 month period of notification will provide grounds for an amendment. Should future confrontations unfold, they should be resolved through diplomatic channels, use of the International Court of Justice (also known as the World Court), and through the United Nations itself. The latter route will prove most difficult since MSR disputes are excluded from the mandatory dispute resolution procedures outlined in Part XV of the 1982 LOS Convention. Further, since hydrographic survey is not recognized as MSR in the 1982 LOS Convention, the effectiveness of such an option is questionable.

Diplomatic channels could be used in other ways. Hydrographic survey data could be obtained from coastal states that collect and process indigenous information or from host states that request American contingency assistance. Many of these states, which receive United States' technical support, are members of the International Hydrographic Organization, headquartered at Monaco. Several nations now possess the capability to conduct local surveys to international standards and are willing to share the information with other nations. Such a practice provides an economically viable alternative for the United States to acquire information, particularly in an era of decreased national hydrographic assets and reduced operating budgets. The advent of the Global Positioning System (GPS) may also permit the United States to realize additional economic efficiencies. The accuracy of the GPS system reduces on-station survey time and eliminates the need for shore based navigational control. Operational level planners and commanders, requiring accurate hydrographic or military environmental data, must be aware of alternative sources of information at their disposal if direct HS is denied. Technological advancements now permit consolidation of records and measurements in geographic data bases on compact disk systems for rapid, easy and reliable access. Additional support may be available from the Defense Mapping Agency (DMA - the central hydrographic and topographic data coordinating authority for joint forces) and the National Oceanic and Atmospheric Administration (NOAA). This support may include

specially tailored products, use of satellite based multi-spectral data (requiring extensive processing), employment of airborne sensors (such as the scanning laser systems used by Canada and Australia), and use of new predictive algorithms which are proving to be quite accurate. Remote sensing (space or airborne based) is limited in capability and turnaround time and may not provide the degree of accuracy sought in turbid coastal waters or in clear waters over 100 meters. Other innovative alternatives may be realized through initiative - such as purchasing data from transnational corporations (e.g., oil companies) which acquire hydrographic data from resource exploration. The scope and use of these alternatives and additional technological breakthroughs may, over time, reduce the current levels of international tension concerning MSR and HS, and allay concerns about the availability of accurate and timely planning support.<sup>53</sup> If the accuracy of these alternatives proves less than acceptable, and future American HS activities continue to be restricted or denied by coastal states, then operational planners may encounter the first known degradation to traditional U.S. military planning methodologies which mandate use of such information to select courses of action.<sup>54</sup>

## CHAPTER IV

### CONCLUSION

Emergent changes in international laws associated with the 1982 LOS Convention demand coordinated, imaginative and functional responses from the United States government. Although 70 percent of the world's surface is covered by ocean waters, current international law is still essentially a land-based system, despite increased numbers of cases dealing with the oceans and incidents at sea. Much uncertainty exists in the future outcomes of ocean-law based disputes between states, although preliminary indications reflect increased acceptance of the provisions of the 1982 LOS Convention. A 'smaller,' more sophisticated world exists where stressful competition, particularly in the economic sector, will drive all societies' national interests and policies. The importance of a coastal state's EEZ does not focus solely on economic potential. Rather it reflects a host of other state values, including strategic and military interests.

Unity of purpose between all United States government agencies must drive timely, coordinated and innovative responses. The complicated and richly talented bureaucracy, for all its faults, has a fabled history of remarkable achievements when pressed into action. Recall the quality of coordinated American responses, in full consonance with international law, conceived in Operations Praying Mantis, Desert Shield and Desert Storm. Domestic foundations to promote and communicate America's ocean policies with regard to marine scientific research, hydrographic survey and military survey are in place, and can be used by operational and tactical level commanders. But the administration must sustain high-level coordination of all government agencies if national ocean policies change in the future and are to be fully supported at the strategic, operational and tactical levels. The same high-level coordination is required to promote the national policy on an international level, and the methodology has been addressed previously.

The security, economic and environmental interests of the United States

would be advanced with the 1982 LOS Convention coming into force. There is a movement urging the United States government to remove its objections for ratification (through Congress) and remove those obstacles which impede larger acceptance of the 1982 LOS Convention (the Deep Sea Bed Mining Regime). The Panel on Law of Ocean Uses highlights emergent international trends that could affect the nation. A coalition of developing countries is engaged in continuing dialogues with a majority of industrialized countries. Without the United States participating in these discussions, the 1982 LOS Convention may come into force through ratification by our allies and this new coalition. Further, one has to consider the greater implications for the country not ratifying the 1982 LOS Convention. The nation may find itself isolated in future economic, security, environmental, and freedom of navigation matters. Worse yet, should the United States attempt changes to the 1982 LOS Convention or submit new ocean law proposals, its actions may be impeded by the same coalitions displaying resolute inflexibility in accommodating our recommendations.<sup>55</sup> The current administration appears to be aware of this tendency and is demonstrating proactive involvement towards acceptance of the 1982 LOS Convention - while continuing to express reservations and concerns over the Deep Sea Bed Mining provisions.<sup>56</sup>

Navy and Marine Corps commanders working in the world's littoral regions develop operational and tactical level plans which are integrated with, and reflect, national policy and strategy. They must be aware that potential challenges (and successful operations) stem from the adequacy and quality of national strategy, policy and resolve. National and military policies provide the ways for a commander to employ the means contained in national resources to achieve national objectives. Further, national strategies and policies will continue to evolve on "an issue by issue basis in response to emerging world events."<sup>57</sup> None of these domestic items are under an operational commander's control, but as 'road maps,' they must be heeded in balance with international law. The extent to which the U.S. government and international organizations and states operate (and cooperate) in a vague, new legal environment with toleration,

mutual understanding and respect for individual state interests will likewise enhance or degrade a commander's ability to execute his mission.<sup>58</sup>

In retrospect, the problem just described is but one of many complex, international issues confronting the United States, but its importance should not go unnoticed, particularly in view of the strength of support of the 1982 LOS Convention by the world community. Only time will tell as the U.S. presses forward and awaits international reaction to its evolving national policies.



APPENDIX I

"THE TRUMAN PROCLAMATION ON FISHERIES  
(No. 2668, September 28, 1945)

Policy of the United States with Respect to Coastal Fisheries  
in Certain Areas of the High Seas  
(By the President of the United States of America)

Whereas for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and, in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international cooperation in this field; and

Whereas such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and

Whereas the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; and

Whereas there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each region and situation and to the specific rights and equities of the coastal State and of any other State which may have established a legitimate interest therein;

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

[SEAL]

HARRY S. TRUMAN

By the President:  
DEAN ACHESON,  
Acting Secretary of State" <sup>59</sup>

## APPENDIX II

### "THE TRUMAN PROCLAMATION ON THE CONTINENTAL SHELF (No. 2667, September 28, 1945)

#### Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf (By the President of the United States of America)

Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

Whereas, recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

[SEAL]

HARRY S. TRUMAN

By the President:  
DEAN ACHESON,  
Acting Secretary of State" <sup>60</sup>

### APPENDIX III

"WHITE HOUSE PRESS RELEASE OF SEPTEMBER 28, 1945

#### The Natural Resources of the Continental Shelf

The President today issued two proclamations asserting the jurisdiction of the United States over the natural resources of the continental shelf under the high seas contiguous to the coasts of the United States and its territories, and providing for the establishment of conservation zones for the protection of fisheries in certain areas of the high seas contiguous to the United States. The action of the President in regard to both the resources of the continental shelf and the conservation of high seas fisheries in which the United States has an interest was taken on the recommendation of the Secretary of State and the Secretary of the Interior.

Two companion Executive Orders were also issued by the President. One reserved and set aside the resources of the continental shelf under the high seas and placed them for administrative purposes, pending legislative action, under the jurisdiction and control of the Secretary of the Interior. The other provided for the establishment by Executive Orders, on recommendation of the Secretary of State and the Secretary of the Interior of fishery conservation zones in areas of the high seas contiguous to the coasts of the United States.

Until the present the only high seas fisheries in the regulation of which the United States has participated, under treaties or conventions are those for whales, Pacific halibut and fur seals.

In areas where fisheries have been or shall hereafter be developed and maintained by nationals of the United States alone, explicitly bounded zones will be set up in which the United States may regulate and control all fishing activities.

In other areas where the nationals of other countries as well as our own, have developed or shall hereafter legitimately develop fisheries, zones may be established by agreements between the United States and such other States and joint regulations and control will be put into effect.

The United States will recognize the rights of other countries to establish conservation zones off their own coasts where the interests of nationals of the United States are recognized in the same manner that we recognize the interests of the nationals of the other countries.

The assertion of this policy has long been advocated by conservationists, including a substantial section of the fishing industry of the United States, since regulation of a fishery resource within territorial waters cannot control the misuse or prevent the depletion of that resource through uncontrolled fishery activities conducted outside of the commonly accepted limits of territorial jurisdiction.

As a result of the establishment of this new policy, the United States will be able to protect effectively, for instance, its most valuable fishery, that for the Alaska Salmon. Through painstaking conservation efforts and scientific management the United States has made excellent progress in maintaining the Salmon at high levels. However, since the Salmon spends a considerable portion of its life in the open sea, uncontrolled fishery activities on the high seas, either by nationals of the United States or other countries, have constituted an ever present menace to the salmon fishery.

The policy proclaimed by the President in regard to the jurisdiction over the continental shelf does not touch upon the question of Federal versus State control. It is concerned solely with establishing the jurisdiction of the United States from an international standpoint. It will, however, make possible the orderly development of an underwater area 750,000 square miles in extent. Generally, submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water is considered as the continental shelf.

Petroleum geologists believe that portions of the continental shelf beyond the three-mile limit contain valuable oil deposits. The study of subsurface structures associated with oil deposits which have been discovered along the Gulf Coast of Texas, for instance, indicates that corresponding deposits may underlie the offshore or submerged land. The trend of oil-productive salt domes extends directly into the Gulf of Mexico off the Texas coast. Oil is also being taken at present from wells within the three-mile limit off the coast of California. It is quite possible, geologists say, that the oil deposits extend beyond this traditional limit of national jurisdiction.

Valuable deposits of minerals other than oil may also be expected to be found in these submerged areas. Ore mines now extend under the sea from the coasts of England, Chile, and other countries.

While asserting jurisdiction and control of the United States over the mineral resources of the continental shelf, the proclamation in no wise abridges the right of free and unimpeded navigation of waters of the character of high seas above the shelf, nor does it extend the present limits of the territorial waters of the United States.

The advance of technology prior to the present war had already made possible the exploitation of a limited amount of minerals from submerged lands within the three mile limit. The rapid development of technical knowledge and equipment occasioned by the war, now makes possible the determination of the resources of the submerged lands outside of the three mile limit. With the need for the discovery of additional resources of petroleum and other minerals it became advisable for the United States to make possible orderly development of these resources. The proclamation of the President is designed to serve this purpose." <sup>61</sup>

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50. Telephone conversation with Captain Patrick Carney, USN, JAGC, Office of the Chief of Naval Operations (N3/N5), Washington, DC of 28 April 1993.

51. U.S. Navy Dept., Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP-9 Rev A) (Washington: Office of the Judge Advocate General, 1989), p. 1-20.

Author's Note: Final sentence of MSR footnote in the NWP above indicates Hydrographic survey and military survey are subject to coastal state jurisdiction - contradicting U.S. national policy as stated in the State Department messages addressed in this paper and the CNO directive. I believe the word "not" is missing as typographical error. Corrective action is underway within the Navy to prevent misleading operational commanders into embarrassing situations. A worst case scenario could unfold when erroneous actions were quietly condoned by other nations and the practice then repeated over time to become customary international law.

52. Marine Scientific Research (Mexico), (Agenda Item #1 for US Delegation to Major Maritime Powers Meeting) (Washington: 14 October 1992), p. 1.

53. Interview with CDR R. Booker, USN, Matthew Fontaine Maury Chair of Oceanography, Operations Department, US Naval War College, Newport, RI: 22 April 1993; Interview with Capt R. Thomas, JAGC, USN, Oceans Laws and Policy Department, US Naval War College, Newport, RI: 27 April 1993.

54. Armed Forces Staff College, The Joint Staff Officer's Guide, 1991 [AFCS Pub 1], p. F-2; Joint Chiefs of Staff, Joint Pub 5-00.2 - Joint Task Force Planning Guidance and Procedures, pp. A-4 - A-5, A-9; U.S. Navy Dept., Naval Operational Planning (NWP-11 [Rev F]), pp. 2-7 - 2-8, B-6 - B-7.

55. Panel on the Law of Ocean Uses, United States Interests in the Law of the Sea Convention (New York: U.S. Council on Ocean Law, 1992), pp. 1-3.

56. Ambassador Madeline K. Albright, Press Release Statement by United States Permanent Representative to the United Nations, at the Secretary-General's Consultations on the Deep Sea Bed Mining Provisions on the United Nations Convention on the Law of the Sea (New York: U.S. Mission to the United Nations, 27 April 1993).

57. Joint Chiefs of Staff, JCS Pub 0-1 - Basic National Defense Doctrine (Draft) 1991 (Washington: Joint Chiefs of Staff, 7 May 1991), p. II-24.

58. D. H. N. Johnson, review of The 200 Mile Exclusive Economic Zone in the New Law of the Sea by Barbara Kwiatkowska, In American Society of International Law, p. 232; Barbara Kwiatkowska, The 200 Mile Exclusive Economic Zone in the New Law of the Sea, pp. xxii - xxiii.

59. Lawrence Juda, Ocean Space Rights (New York: Praeger Publishers, 1975), p. 151.

60. Ibid, p. 153.

61. Ibid, p. 155.



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